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April 25, 1998
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Office of the Secretary
Room 222
Federal Communications Commission
1919 M Street N.W.
Washington, D.C. 20554

Dear Commissioners and Commission Staff:

Enclosed are an original and nine copies of Special Comments Requesting A Suspension of Microbroadcasting Prosecutions, of the RM-9208 Petitioners.

The document is 27 pages long, not including the Table of Contents. When it was taken to a photocopying center today (Saturday, April 25, 1998), the photocopying center encountered unexpected difficulties in reproducing the number of pages involved in providing the Commission with nine copies.

As a result of these difficulties, which led to delays, the original and nine copies were not delivered to the nearest Federal Express office before it closed (at 5:00 p.m.).

Despite diligent efforts, which covered the entire state of Connecticut, no express mail delivery office could be found that was open between 5:00 p.m. on April 25 and 8:00 a.m. on April 27.

These Special Comments are being FedExed to you at literally the earliest opportunity that was available under the circumstances. They should reach you early on April 28.

On behalf of the team of RM-9208 Petitioners, I offer my most heartfelt apology for the delayed delivery. I ask you to treat these Special Comments, which were turned over to Federal Express on April 27, as "timely filed".

Your flexibility on this point would be greatly appreciated.

Thank you in advance for considering this request -- and for considering these Special Comments.

Sincerely,

Don Schellhardt

Attorney Don Schellhardt

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RE: DOCKET NO. RM-9208

NOTE: Copies of these Special Comments are being sent to all parties who sent copies of their Written Comments to us.

UNITED STATES OF AMERICA

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

Petition For A)

Microbroadcasting) Docket No. RM-9208

Service)

SPECIAL COMMENTS, REQUESTING A SUSPENSION OF MICROBROADCASTING PROSECUTIONS, OF THE RM-9208 PETITIONERS: NICKOLAUS E. LEGGETT, JUDITH FIELDER LEGGETT AND ATTORNEY DONALD J. SCHELLHARDT

We, the undersigned Petitioners in RM-9208, hereby submit Special Comments. We request suspension of ongoing microbroadcasting prosecutions and retroactive amnesty in the event that some or all microbroadcasting stations are ultimately made eligible for legal status.

THANK YOU

At the outset, we thank the Commission for: (a) granting our March 4, 1998 request to extend the comment period in this Docket; (b) indicating the specific dates by which Written Comments and Reply Comments are now due; (c) setting the Written Comments and Reply Comments deadlines in RM-9208 so that they match the comparable deadlines in RM-9242, thereby simplifying considerably the process of participation for all who are concerned with legalization of microbroadcasting stations; and (d) including the text of our Petition, along with the text of other relevant Petitions, at the Commission's Web Site.

We note for the record our continuing assertion that notice regarding RM-9208, and related Petitions, should be published in the FEDERAL REGISTER -- along with the complete text of each Petition and related relevant information.

Nevertheless, we remain grateful to the Commission for responding to a substantial majority of our requests in our March 4, 1998 filing.

SUSPENSION OF MICROBROADCASTING PROSECUTIONS, WITH POSSIBLE RETROACTIVE AMNESTY

We ask the Commission to take the following steps:

1. Suspend all ongoing microbroadcasting prosecutions until such time as the Commission has: (a) adopted a final rule which legalizes some or all microbroadcasting stations; or (b) decided and announced that it will not legalize any such stations.

In other words, all ongoing prosecutions would be suspended while the Commission's current reconsideration of its microbroadcasting policy is in progress.

2. If the Commission does decide to legalize some or all microbroadcasting stations, grant amnesty to those charged with violation(s) of the currently applicable regulations. In this eventuality, charges against current Defendants would be dropped -- not just suspended -- and the Commission would

advise the appropriate court authorities that previously imposed penalties, against previously convicted Defendants, should be lifted.

We would expect and accept that suspension of prosecution and/or retroactive amnesty would not be available automatically -- and/or could be revoked -- in those cases where the Commission can demonstrate, with evidence, that: (a) there are valid complaints against the microbroadcaster which, after a reasonable opportunity for corrective action, the microbroadcaster would not or could not resolve; and/or (b) there are threats to the public health or safety, such as interference with aircraft navigation signals, which, after an immediate station shutdown and a reasonable opportunity for corrective action, the microbroadcaster would not or could not resolve.

We ask for evidence, especially in cases of alleged endangerment of the public health and safety, in response to general principles of law and also in response to the common perception -- within the microbroadcasting community -- that concerns about interference with aircraft navigation signals have been overstated or even manufactured. The RM-9208 Petitioners do not know enough to either support or refute these suspicions, but we note that we have never heard of any complaints that "ham" radio signals (which have been legal

and common for decades, often using home-built equipment) are posing any kind of threat to aviation.

In any case, we believe that a suspension of prosecution, with the possibility of retroactive amnesty, would be in the interests of the Commission, the broadcasting industries and the nation as a whole.

WHY A PROSECUTION SUSPENSION, WITH POSSIBLE RETROACTIVE AMNESTY, WOULD SERVE THE COMMISSION'S INTERESTS

The requested suspension of prosecution, with possible retroactive amnesty, would be in the Commission's interest.

I. It would improve the Commission's credibility by demonstrating a sense of fairness and flexibility. After all, how does it look to the public when people are fined -- or even jailed -- for violating regulations that the even the Commission has implicitly acknowledged as a possible mistake?

II. The prosecution suspension would free up staff resources, at a currently under-staffed Commission, for other enforcement priorities. It would also be a good way for the Commission to begin the transition to post-legalization microbroadcasting regulation, when enforcement personnel will be focused on making sure that microbroadcasting stations follow the rules -- rather than trying, unsuccessfully, to make sure they don't exist.

III. If the Commission deals in a reasonable manner with violators of current regulations, it will have more credibility -- and probably more active support -- within the post-legalization microbroadcasting industry. This added credibility and support could be a vital asset in restraining those who continue to violate Commission regulations even after they have been given the option of operating legally.

IV. A suspension of microbroadcasting prosecution, with the possibility of retroactive amnesty, would undo some of the damage the Commission has recently done to itself, in the eyes of the general public, through shutting down microstations that are highly valued -- if not beloved -- by those they serve. A prosecution suspension would also remove the risk of further "self-inflicted wounds".

The Commission must be aware that its public reputation is hardly enhanced when it shuts down stations that are clearly meeting an otherwise unaddressed public need.

A recent example of such a station shutdown arose in Tampa. There, agents of the Commission yanked off the air a microstation that was operated in a church by a church. In the process, the Commission also removed from the public's reach an on-the-air suicide prevention Hotline, among other charitable services.

To cite another example, the Commission recently shut down the only Spanish language station in New Haven: a city whose

17,000 Hispanics account for roughly 1 out of every 5 residents.

The New Haven case -- involving La Nueva Radio Musical ("The New Radio Music") -- is particularly instructive because it illustrates so many different points simultaneously.

First, for a number of years, there was a licensed Spanish language station in New Haven. This licensed station, however, was acquired in 1997 -- by new owners who promptly shifted its format to English. (An example of diversity reduction through station acquisition)

Second, responding to the sudden vacuum within the local Hispanic community, two Hispanic entrepeneurs started up La Nueva Radio Musical -- but they could not afford to buy an established station, they could not afford to set up a new station with power above 100 watts and they were not allowed to seek a license for a station with power below 100 watts. They became unlicensed radio station operators because Commission regulations left them no other option except silence. (An example of how rigid policies can produce "reluctant rebels")

Third, the public reaction to the shutdown of La Nueva Radio Musical has been dramatic and unequivocal. Within two weeks of the first enforcement action by the Commission, over 5,000 residents of New Haven County signed petitions in support of keeping the station on the air. Most of the signatories were Hispanic -- but not all. New Haven's Mayor, John

DeStefano, endorsed the station's cause within 24 hours of the station's call for help. So did several members of the New Haven Board of Aldermen.

Several neighborhood groups demanded the return of La Nueva Radio Musical to the airwaves. At the same time, numerous Hispanic merchants related how the station had brought them unprecedented economic growth by providing affordable advertising, heard daily by their best potential customers. Later, a press conference held by the station owners was covered by three TV stations (serving New Haven and Hartford) as well as several newspapers from across the state. (An example of how highly a community can value an unlicensed microstation -- and how vigorously it will rise up to defend such a station)

A suspension of microbroadcasting prosecution, with the possibility of retroactive amnesty, would heal some of the damage the Commission has done to itself in Tampa, in New Haven and in other communities across the nation.

There need be no other such incidents if the Commission is willing: (a) to legalize -- or, more precisely, re-legalize -- microbroadcasting; and (b) to put prosecutions on hold while it charts a new, and better, course for the future.

WHY A PROSECUTION SUSPENSION, WITH POSSIBLE RETROACTIVE AMNESTY, WOULD SERVE THE PUBLIC INTEREST

The Commission is required, by its governing statute, to concern itself with the general health of the broadcasting industries and the general health of the U.S.A. ("the national interest"). From this broader perspective, there are additional reasons why microbroadcasting prosecutions should be suspended.

V. The prevailing concept of justice, in the Western industrialized world, demands that people should not be fined and/or jailed for violating regulations that are later found to be a mistake.

We are, of course, aware of the counterargument. "The law is the law", some might say, and actions which violate the law should be punished. Whether or not the law is changed later, some could argue, it was still the law when the alleged violators knowingly broke it. Regardless of whether or not the violated regulations were misguided or mistaken, these regulations were "the law of the land" and therefore they should have been obeyed. Or so the counterargument goes.

At the core of the debate is the issue of whether it is indeed irrelevant, for purposes of prosecution, that the violated law was -- or may have been -- "misguided or mistaken".

This leads us directly into the philosophy of law. The debate can only be resolved by asking: What are laws FOR??

We assert that three relevant propositions have, over the course of centuries, become embedded in Western concepts of law and justice.

PROPOSITION #1: Law and justice are not always the same thing. Law, as a concept, is subordinate to justice, as a concept -- not the other way around.

PROPOSITION #2: Within the world of law, statutory and regulatory laws are subordinate to the laws set forth in the basic charter of a nation. In our country, this means the U.S. Constitution.

PROPOSITION #3: Tracing the roots of law in the Western industrialized world, we find that all law -- even American Constitutional law -- has traditionally been viewed as flowing from a "higher law". Typically, though not uniformly, the higher law was viewed as divine in its origins.

This higher law has been a glowing core of principles that even humanists might call "sacred".

In the view of many who embraced the higher law, its core principles were literally handed down from On High while Moses stood atop Mount Sinai. These core principles were then amplified and interpreted over the subsequent centuries by a series of divinely inspired humans. For Christians with traditional views, one of these messengers was himself divine.

For other thinkers, the higher law was a "natural law".

It was derived from observation of Nature -- or at least of human nature. From these observations came lessons about what human beings need to feel secure, happy, fulfilled and productive. Then, from these lessons came general principles about how societies, and their governments, should be constructed in order to "go with the grain" of human beings at their best.

Some natural law philosophers were strictly secular in their speculation, finding legitimacy in natural law as an expression of "the way the world works" -- whether by accident or design. More commonly, however, natural law was seen as the imprint of a divine plan -- albeit a plan which could be understood, at least in part, through reason. In this respect, it differed from the traditional Judaeo-Christian emphasis on intuition and inspiration. In practice, however, the "bottom line" precepts were usually similar or identical to those derived from a more traditional process of Judaeo-Christian faith and belief.

In short, natural law and the law of Moses, plus the teachings of Jesus and the prophets, flowed together to form a common core of higher law -- resting on the twin pillars of reason and revelation. Our own Declaration of Independence resonates with a declaration of higher law. "We hold these truths to be self-evident: that all men (people) are created equal, and endowed by their Creator with certain unalienable

rights. That among these rights are life, liberty and the pursuit of happiness. To secure these rights, governments are instituted among men .... "

The Subordination Of Laws To Their Purposes

Consider the first of the propositions we have cited: that the details of specific laws, and/or the actions taken to enforce them, may be judged by the standard of the purposes which these laws were established to serve.

Those who follow the Christian portion of the Judaeo-Christian code still teach children in Sunday schools the New Testament story of legalists who criticized Jesus for healing a sick man on the Sabbath. "The Sabbath was made for Man," Jesus replied, "not Man for the Sabbath."

The Jewish portion of the modern Judeao-Christian community holds to the same perception of priorities. Today, even strictly Orthodox Jews hold that it is permissible, if not obligatory, to "work on the Sabbath" if that "work" takes the form of aiding someone whose health or life is at stake.

Of course, not all Americans are Christians or Jews, let alone practicing Christians or observant Jews. Nevertheless, the Judaeo-Christian worldview has shaped our culture -- and our culture has shaped our laws. As one practical result, the intent of a lawbreaker and/or the unreasonableness of a given

legal requirement, as written and/or as applied, have long been raised in Western world courts as legitimate arguments for acquitting a defendant or imposing a light sentence. Such arguments have not always been accepted by judges and juries: they have not even been frequently accepted by judges or juries. Nevertheless, such arguments have been accepted sometimes -- and it has always been considered legitimate to raise them, just as we raise them now.

To illustrate how these values might be applied in a "real world" courtroom, in a situation not terribly different from the "real world" situation that faces the Commission today, we invite you to take a mental journey with us in time and space -- to Mississippi, in the summer of 1964.

You sit in a courtroom as the judge. A black defendant is being brought to trial -- for refusing to leave a lunch counter that was, until recently, reserved for "Whites Only". Now, due to the enactment by Congress of the Civil Rights Act of 1964, that lunch counter is open to all -- but it wasn't open to all a year ago, when the defendant led a "sit-in" demonstration. Back then, it was segregated -- by law.

In short, the defendant is about to go on trial for violating a law that is now itself illegal.

Before the trial can even begin, the defense attorney moves for a dismissal of the case.

"Your Honor," he says (and, in the Mississippi of 1964, the defense attorney is most assuredly a "he"), "this case has been rendered moot, or at the very least unreasonable on its face, by the recent actions of Congress."

"Not so!" shouts the prosecutor, jumping to his feet. "Regardless of what Congress may have done in the meantime, the defendant's actions were against the law at the time he took them. And the law is the law! We cannot allow those who knowingly violate it to walk away unpunished."

Now .... the decision is yours. Would you rule that the trial should proceed?

We suspect that you would not.

A decision to proceed would run counter to ingrained American traditions of fairness -- and to ingrained American conceptions of common sense. "The war is over," Americans say when a war is over. "Let's go home -- and let's let our prisoners go home, too."

Incidentally, a decision to proceed with this trial would also prove to be bad politics. In the next Session of Congress, the Civil Rights Act of 1964 would be followed by the Voting Rights Act of 1965, allowing millions of disenfranchised Southern blacks to register and vote for the first time. The electorate would change, the roster of elected officials would change and "Whites Only" would be going out of style -- for good.

The Subordination Of Statutory and Regulatory Laws To The U.S. Constitution

Now we invite you to take another mental journey with us. This time, the time is the present.

The place is the heart of New York's scenic Hudson Valley. There, you will find the United States Military Academy: West Point, New York.

Sprawling between the seasoned buildings are broad, rolling lawns. Perhaps you will see a drill team practicing on them. Perhaps you will see students pacing briskly to and from their classes. Perhaps you will see a few couples, strolling along peacefully, one of them in uniform. Almost certainly, you will see other tourists like yourself.

Apart from the people, however -- the students who arrive and graduate; the instructors who arrive and retire, or move on to a new posting; the tourists who come and go like leaves in a breeze -- there are the markers on the lawns. They stay. They endure. Like modest monuments, they fade into the background of the campus -- but they are always there, and they are scattered everywhere.

You cannot walk across the campus without seeing them -- seeming them everywhere -- unless your eyes are closed.

And each marker bears a message.

The topics differ: history, philosophy, military strategy and more. There is, however, one underlying goal: building in each cadet the character to be a good soldier, in the best traditions of the military rather than the worst.

One such marker is entitled: "The Soldier and the Constitution".

In most countries of the world, the marker relates, soldiers take an oath of loyalty to their governments -- or even to their individual political leaders, elected or not. Here, however, in America, soldiers take an oath of loyalty to a document -- a set of living ideas, expressed in words but larger than any words and larger than any institutions. The soldiers of our nation, like the elected officials of our nation, pledge "to preserve and protect the Constitution of the United States" and to guard it "against all enemies, foreign or domestic".

Here, in the heart of West Point, in the training grounds for future leaders of one of our nation's most authority-oriented institutions, the concept is nonetheless taught that sometimes, in extreme cases, there can be a higher duty than obedience to orders. Sometimes, when the Constitution is threatened by the orders or actions of those with established authority, there can be a duty to disobey.

Thus we teach soldiers: soldiers who will lead soldiers.

Why should we be surprised when current microbroadcasters act on the same belief?

Why should we be surprised when they defy regulations they regard as unconstitutional -- as, indeed, a threat to the Constitutional rights of all Americans, whether those Americans are broadcasters, or listeners, or both?

The Commission is well aware that Stephen Dunifer, and his lawyers, formally contend that the current Commission regulations violate the First Amendment. As we understand their argument, they contend that the First Amendment of the United States Constitution -- which guarantees "freedom of speech" -- prevents the Commission from regulating access to the airwaves beyond the minimum extent necessary to prevent chaos and allocate frequencies justly in light of a perceived scarcity of available frequencies.

As the Commission is also aware, Judge Claudia Wilken, of the Ninth Federal Circuit Court in San Francisco, has accepted this argument to the extent of blocking a proposed injunction against broadcasts by Stephen Dunifer. Her ruling is not a ruling that Stephen Dunifer's constitutional arguments are correct. It is, rather, a ruling that Stephen Dunifer's constitutional arguments may be correct -- and that his possible but so far unproven "Constitutional right to broadcast" should be honored until a final decision is made on his claims.

Could not the Commission follow the same chain of reasoning to a suspension of microbroadcasting prosecutions? Could not the Commission say: "We will suspend prosecutions -- not drop them, but suspend them -- until we know whether the Commissioners are going to give at least some of these defendants the regulatory right to broadcast? And/or until we know whether the courts are going to conclude that at least some of these defendants have a Constitutional right to broadcast?"

In any case, we note for the record the First Amendment arguments which have been raised by Stephen Dunifer and his attorneys. We also preserve for the record the right to develop and/or refine these First Amendment arguments in any possible future filings with the Commission and/or the courts.

We add to the record, however, our own assertion that current Commission regulations violate the Fourteenth Amendment to the Constitution: "equal protection of the laws".

We do not question the Constitutional authority of Congress to empower the Federal Communications Commission to regulate "commerce among the several States", as envisioned in the Commerce Clause of the Constitution. Nor do we challenge the Commission's authority to conduct such regulation with some degree of reasonable discretion as to the details. In fact, some of the details of our own proposal -- notably, keeping large institutions out of the microstation market -- depend

implicitly on the Commission's legal ability to regulate commerce on the airwaves.

Nevertheless, we assert that the Commission's regulatory authority -- not as written in the Communications Act of 1934, but as applied in practice -- denies "equal protection of the laws". "Equal protection of the laws" is denied to both radio listeners, whose legal listening choices are now largely dictated by an oligipoly of companies you can count on the fingers of one hand, and to potential radio broadcasters, whose access to the market has been blocked by Federal law in the service of megacorporations and NPR.

First, the Commission -- through its prohibition of microbroadcasting, and through other policies -- has denied the option of legal access to the airwaves to all but those who can afford to transmit at high power levels (or, like National Public Radio, are subsidized by those who can). The claim of "spectrum scarcity" may well justify allocation of the airwaves by a government agency, but it does not begin to justify use of that allocation authority to reserve virtually all of the available frequencies for use by the richest institutions alone.

We believe that we are open to alternative ways of looking at the world, but we cannot imagine -- nor have we heard anyone suggest -- any chain of responsible reasoning that justifies

sealing off the airwaves, as a private game preserve for the rich, and arresting the citizens who broadcast as "poachers". The proposition is absurd -- or royalist -- and the Constitution allows neither as a basis for government agency decisions.

Recently, this radio royalism been amplified greatly by Congressional approval of laissez-faire station acquisitions, and mandate for sale of radio station licenses to the highest bidder, in the Telecommunications "Reform" Act of 1996. We note that President Clinton, and other prominent Democrats, joined Republican Congressional leaders to endorse and enact the bill.

This Act of Congress is also unconstitutional, for the same reason: it reserves the airwaves for the rich and powerful, or more precisely for the most rich and powerful among the rich and powerful, and denies access to the airwaves for all other Americans. It is income-based and asset-based discrimination against the entirety of the American population.

Second, we assert that the potential penalties for illegal microbroadcasting are severely disproportionate to those for actions with a comparable impact on society. Is it "equal protection of the laws" to impose a moderate fine for civil trespass -- and potential decades in prison

for the "crime" of unlicensed operation of a small radio station? A man in Texas is now awaiting his criminal sentencing after being convicted of the "crime" of illegal microbroadcasting. He faces a potential prison sentence of 28 years. By contrast, one of the Petitioners, Attorney Don Schellhardt, recently saw the sentencing of a first offender charged with 5 counts of sexual abuse against two children, age 4 and 11. He faced a possible sentence of 60 years (and actually received an effective sentence of 12 years, or 10 with "good behavior").

Does the convicted microbroadcaster in Texas really deserve a potential sentence that equals almost half of the potential sentence for 5 counts of sexual abuse in Connecticut? Is it really Constitutional? Can anyone really call it justice?

Third, we suspect -- although we cannot yet prove -- that the Commission's investigation and enforcement of microbroadcasting cases is disproportionately high when compared to the Commission's investigation and enforcement of possible violations of Commission regulations by large, licensed broadcasters. Were we to become involved in litigation over this point, we would probably file numerous discovery motions -- aimed at a detailed comparison of enforcement oversight for current microbroadcasters versus enforcement oversight of the rich and powerful. The results might interest both courts of law and courts of public opinion.

The Subordination of All Laws to A "Higher Law"

For centuries, as an implicit application of "higher law" thinking, Western judicial thinkers divided offenses into two basic categories. Being Western judicial thinkers, in a more formal era than our own, they phrased the distinction in Latin.

The first class of offenses, for which mild sentences were usually prescribed, were mala prohibitum: "prohibited evils". These were violations of laws designed to enhance the orderly functions of society, classified as offenses because the established authorities decided to make them offenses.

Modern examples of mala prohibitum would include illegal parking, smoking in a "No Smoking" section or driving faster than the speed limit.

The second category was mala in se: "evil in itself". These offenses were described, with medieval flair, as "crimes so heinous that they offend the universal conscience of Mankind".

Today -- as then -- examples of mala in se would include rape and murder.

Most modern attorneys have forgotten this distinction (if, indeed, they were ever taught it) -- but the clear distinction lives on, unspoken, in American law and culture.

Most Americans would not hesitate to report -- or even intervene, at personal risk, to prevent -- a rape or a murder.

They would strongly favor severe penalties for these crimes: probably penalties more severe than most American courts would be willing to impose.

At the same time, a substantial majority of Americans routinely violate speed limits. A significant minority routinely leave parking tickets unpaid and/or light up tobacco products (especially if no non-smokers are around) in areas where smoking is prohibited. These are mala prohibitum offenses -- and the American people vote with their behavior that such offenses should be punished lightly, if at all.

The point, of course, is that illegal microbroadcasting is a mala prohibitum offense.

Time For A "Ceasefire"

VI. The current situation is not unlike a stalemate in a protracted war. On one side of the barricades, the Commission -- after much effort -- has "taken prisoners" (literally), and has closed down many microbroaedcasting stations, but has not been able to wipe out the microbroadcasting industry as a whole. On the other side of the barricades, the current microbroadcasters -- after much effort -- seem to have achieved survival for their industry but are still very much at risk as individuals.

Both have had victories but neither has defeated the other.

Historically, this is the point at which rival forces often conclude that peace just might be better than war.

And peace often -- not always, been often -- begins with peace negotiations, which often begin with "gestures of good faith", which often begin with a ceasefire. There are exceptions, notably the Korean War and the Vietnam War, but ceasefires -- as a backdrop for peace negotiations -- are more common than not.

A suspension of prosecutions, at this time, will be a powerful gesture of good faith. It will greatly facilitate constructive dialogues between the Commission and current microbroadcasters. In turn, such constructive dialogues will greatly increase the prospects for new microbroadcasting policies that WORK -- because each "side" will understand better what motivates the other, and what the other has to have.

"Political Crimes": HANDLE WITH CARE

VII. The microbroadcasting "crimes" at issue here merit extra flexibility because they are "political crimes". We define "political crimes" as "non-violent but unlawful actions motivated by the desire to improve society, and/or a segment of a society, rather than by the desire to advance self-interest at the expense of others".